INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

July 10, 2012

FILED/ACCEPTED

JUL 10 2012

Federal Communications Commission
Office of the Secretary

BY HAND DELIVERY & ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless*, LLC, WT Docket No. 12-4**

Dear Ms. Dortch:

In accordance with the procedures outlined in the Second Protective Order adopted in the above captioned proceeding,[1] enclosed herewith are two copies of the redacted version of an *ex parte* letter submitted by the Independent Telephone & Telecommunications Alliance, which also has been filed electronically. Copies of the Highly Confidential version of the letter have been submitted under seal and provided to Commission staff as required in the Second Protective Order.

Please let me know if you have any questions regarding this submission.

Very truly yours,

Mil Caldwell

Micah M. Caldwell
Vice President, Regulatory Affairs

cc: Sandra K. Danner

[1] *In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless*, LLC, WT Docket No. 12-4, Second Protective Order (rel. January 17, 2012).

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REDACTED - FOR PUBLIC INSPECTION
SUBJECT TO SECOND PROTECTIVE ORDER IN WT DOCKET NO. 12-4
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission
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Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: *Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC for Consent to Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, WT Docket No. 12-4

Dear Ms. Dortch:

The members of ITTA (the "Midsize Carriers") believe that the pending spectrum transactions are integrally bound up with the expansive business arrangements embodied in the agency, resale and joint operating agreements filed in this proceeding by the Applicants (commonly referred to as the "Commercial Agreements"). A review of the available portions of those documents under the terms of the applicable FCC protective orders confirms this to be the case.[1]

The Midsize Carriers write to emphasize that a thorough, open review of the Commercial Agreements by the Commission is required before ruling on the pending license assignment applications, and appropriate conditions should be imposed on the Applicants to protect competition and the public interest. The public interest will not be served by the proposed transfer of spectrum licenses if, as the Midsize Carriers believe,

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1 *See Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo, LLC for Consent to Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Second Protective Order, WT Docket No. 12-4 (Wireless Tel. Bur. rel. Jan. 17, 2012) ("Second Protective Order").

the broader transactions, of which the licenses are but a part, will reduce competition and increase barriers to entry in the wholesale and residential communications markets.

Further Review of the Proposed Transactions Is Warranted

The Midsize Carriers are concerned that the Commission is poised to rule on the pending applications without adequate consideration of the arrangements among the Applicants that extend well beyond the purchase and sale of radio-frequency spectrum. The public interest standard requires the Commission to evaluate whether the Commercial Agreements contain additional consideration for the exchange of the spectrum and, if so, whether that additional consideration is consistent with the public interest. Indeed, the significance of the Commercial Agreements to the overall transaction cannot be overstated. As the record in this proceeding has developed, it has become apparent that the *Applicants* consider these arrangements to be an integrated and essential part of the whole. As such, in deciding whether to approve the spectrum transactions, the Commission may not ignore the Commercial Agreements nor put off their consideration for another day.

The Commission is bound by the Communications Act and its own precedent to consider all aspects of the transactions the Applicants have placed before it, and it has broad authority to condition its approval of the license assignments on the acceptance by the parties of conditions that will protect the public interest from transaction-specific harms.[2] In the instant transactions, review should not be restricted to the assignment of wireless licenses when the Applicants themselves have characterized the Commercial Agreements as "integrated" into the spectrum deal.[3] Particularly given the network scope and dominant or near-dominant market positions of the parties involved, the Commission must carefully consider the implications of such an intricate marriage of interests among these Applicants. For example, if the Applicants anticipate increased profitability by reducing competition through the Commercial Agreements, it would be inconsistent with the public interest to permit the proposed spectrum transfer. The Commission therefore should allow for a thorough examination of all of the relevant arrangements among the Applicants, and fully weigh their competitive impact, not just on the market for mobile wireless services but on the other affected markets discussed below and elsewhere in the record of this proceeding.

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[2] *See, e.g, Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, 23 FCC Rcd 17444 (2008) (imposing roaming conditions in context of spectrum assignment). *See generally*, 47 U.S.C. §§307, 309(a), 310(d).

[3] *See* Reply Comments of Sprint Nextel Corp. in WT Docket No. 12-4 (filed Mar. 26, 2012) at 3-4 ("Sprint Reply Comments") (*citing* statement of David L. Cohen, Executive Vice President, Comcast Corp., *quoted in* E. Krigman, "Comcast Defends Verizon-SpectrumCo Deal," POLITICO PRO, Mar. 8, 2012).

The Midsize Carriers recently have become concerned that the Commission might proceed with bifurcated consideration of the pending transactions, processing the spectrum applications separately from the Commission's review of the Commercial Agreements. Bifurcation of the proceeding, however, may preclude a thorough examination of these closely interrelated transactions. The Applicants chose not to fully disclose the full extent of their arrangements at the outset, and have delayed their production of requested information throughout the proceeding.[4] Moreover, the Applicants continue to withhold potentially critical portions of the Commercial Agreements from Outside Counsel and Consultants who have agreed to the terms of the Second Protective Order and should be given access to all Highly Confidential information produced by the Applicants in this proceeding. The Applicants should not be given a ruling on their spectrum transaction standing alone when it is becoming increasingly apparent that there is much more to their business dealings than they have chosen to present for Commission approval.

The Commercial Agreements Threaten the Public Interest

The pending transactions threaten significant harm to the public interest by foreclosing competition among broadband network operators. Contrary to the Applicants' assertions, the effects of the pending applications are not limited to wireless markets. The Applicants propose not only further consolidation of broadband-capable spectrum in the hands of Verizon Wireless, but also a significant consolidation of *wired* communications operations through the Commercial Agreements. Moreover, and perhaps even more importantly, the transaction significantly advances the consolidation of wireless and wired services, reducing the likelihood of inter-modal competition and increasing barriers to entry for stand-alone wired and wireless providers. Just in the limited universe of currently available information, the Midsize Carriers have identified at least three major threats to the public interest posed by the pending transactions.

- The preferential arrangements among the Applicants and their joint development of proprietary technology will stifle the competitive wireline backhaul market, chill future broadband investment, and threaten competitive deployment of fiber distribution facilities.

- The Commercial Agreements threaten competition in the delivery of video and other content to consumers over wired networks.

- If they are unable to complete seamless and integrated handoffs between wireline and wireless networks, competitors to the Applicants will be at a disadvantage in competing for residential customers. **[BEGIN HIGHLY CONFIDENTIAL]**

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4 *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, to Michael Samsock *et al.*, May 1, 2012 (describing the Applicants' untimely production of requested materials).

> **[END HIGHLY CONFIDENTIAL]** will effectively cut off consumers from access to alternative broadband delivery services offered by incumbent local exchange carriers ("ILECs") such as the Midsize Carriers and other competitors.

Any of these effects should be cause for Commission concern. The combination represents a threat to wireline broadband competition and future broadband investment.

Backhaul Competition: Under the Commercial Agreements, the parties have created strong incentives to ensure that competitors such as the Midsize Carriers no longer receive backhaul business. For example, in **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] they will effectively shut out all competition for backhaul contracts with Verizon Wireless. The Midsize Companies believe that this will significantly impact their investment decisions and speed of rural broadband deployment. As wireless providers deploy microcell architectures, wireless backhaul will be critical to the viability of residential fiber-based broadband deployments. Cable companies already have a substantial market share advantage in residential broadband deployments.

Moreover, the long-term effect of removing such a substantial customer from the market will be to undermine the competitive backhaul market in its entirety, harming not just the ILECs but also competitive wireless providers, who no longer will have access to multiple alternatives for carriage of wireless voice and broadband traffic.[5] Indeed, the intimately co-dependent relationship among the Applicants may create a strong disincentive for the cable companies to offer backhaul to Verizon Wireless's competitors particularly in areas where Verizon also is the incumbent local exchange carrier.[6] The Commission should not pass on the pending transactions without examining these significant anti-competitive effects on the backhaul market.

Independent Content Access: The Midsize Carriers also are concerned about the Applicants' joint development and licensing of proprietary intellectual property for **[BEGIN HIGHLY CONFIDENTIAL]**

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[5] *Accord,* Letter from David H. Pawlik, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed June 20, 2012); Reply Comments of Level 3 Communications, LLC, WT Docket No. 12-4 at 8 (filed Mar. 26, 2012).

[6] *See* Sprint Reply Comments at 14.

[END HIGHLY CONFIDENTIAL] The Midsize Carriers agree with other commenters that this arrangement is especially troubling as a sign that the Applicants have agreed to **[BEGIN HIGHLY CONFIDENTIAL]** .[7]

[END HIGHLY CONFIDENTIAL] The results will be the chilling of innovation, as independent content providers fail to gain access to the proprietary platform this juggernaut produces, and the diminution of competition, as unaffiliated broadband providers fail to gain access to content controlled by the Applicants. This dynamic would be particularly impactful to competition to the extent that customers purchasing both cable broadband and Verizon Wireless service can share content across wired and wireless devices in a manner that would be denied to customers that purchase either wired or wireless service from a competitor.

Wi-Fi Access: Both cable operators and ILECs have been turning to public and private (in-home or in-building) Wi-Fi to extend the capabilities of their wired networks and improve the customer's broadband experience. As commenters have pointed out, Wi-Fi can be used to extend broadband delivery over DSL, fiber or cable to give customers greater flexibility and faster connections within their premises.[8] Mobile data offloading using cable broadband delivery to households and wireless technology within customer premises can provide a substantial marketplace advantage. Unless competitors have access to this type of seamless hand-off between delivery platforms, competition effectively will be cut off. **[BEGIN HIGHLY CONFIDENTIAL]**

.[9] **[END HIGHLY CONFIDENTIAL]** In short, without the same Wi-Fi access, it appears that unaffiliated wireline and wireless broadband service providers will be at a significant disadvantage in

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7 *See, e.g.,* Reply Comments of Public Knowledge, Media Access Project, et al., WT Docket No. 12-4 at 10-12 (filed Mar. 26, 2012).

8 *See, e.g.,* Sprint Reply Comments at 10-11 (describing consumer benefits of Wi-Fi supplement to broadband networks, and expressing the concern that the proposed transaction will reduce competition in Wi-Fi access, raise competitors' costs, and reduce wireless broadband competition).

9 Letter from David H. Pawlik, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 (filed June 20, 2012).

gaining access to customers in competition with the combined forces of Verizon Wireless and the cable companies.

The Pending Transactions Must Not Be Approved Without Conditions To Protect Competition

The Midsize Carriers urge that, at a minimum, the Commission impose the following conditions on the Applicants to mitigate the harms to competition posed by the pending transactions:

1. Prohibit preferential backhaul arrangements among the Applicants.
2. Prohibit discrimination in access to video content controlled by any of the Applicants.
3. Prohibit discriminatory or proprietary technical standards for hand-off between wireless and wireline networks, data sharing, content storage and access to competitive networks.
4. Prohibit the Applicants from enforcing data usage limits on customers using unaffiliated service providers unless the same data usage limits apply to their own customers.
5. Prohibit exclusivity in broadband retail offerings by Verizon Wireless.
6. Require the Applicants to follow the same porting processes that are required of telecommunications carriers under Part 64 of the Commission's rules.
7. Prohibit cable Applicants from discriminatory or exclusionary sales practices for cable advertising.

Interested Parties Require Greater Access to the Commercial Agreements

Finally, the Commission should not conclude its evaluation of the pending transactions until it and all affected parties have had a reasonable opportunity to analyze the import of the Commercial Agreements in their entirety. Because of the Highly Confidential designation of much of the material in the Commercial Agreements, the Midsize Carriers have very limited access to their contents. Although Outside Counsel and Consultants have had greater access, even this is incomplete, with portions of the documents still redacted. Moreover, Outside Counsel and Consultants are severely restricted from discussing the substance of the Commercial Agreements with their clients. Thus, some provisions of the Commercial Agreements may be even more harmful than those identified here.

In order for the Commission to comprehensively evaluate the transactions proposed by the Applicants, and for interested parties to meaningfully participate in this proceeding, the Commission should require that the Applicants broaden their disclosure of the Commercial Agreements so that, at a minimum, complete copies of the Commercial Agreements are made available to Outside Counsel and Consultants, and company in-house counsel may discuss with Outside Counsel and Consultants the impact of these arrangements on affected customers and markets.

Please contact me if you have any questions.

Very truly yours,

Genevieve Morelli

Genevieve Morelli
President

Mel Caldwell

Micah M. Caldwell
Vice President, Regulatory Affairs

cc: Sandra K. Danner, Broadband Division
Wireless Telecommunications Bureau